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JOHN F. DAVIS,

In the Supreme Court of the United States

OCTOBER TERM 1969

No. 560 Misc. 829

GENEVER LEWIS, et al.,
Appellants,

vs.

JOHN C. MONTGOMERY, et al.,
Appellees.

On Appeal from the United States District Court for the Northern District of California

Motion to Affirm

[redacted] STATEMENT NOT PRINTED.

THOMAS C. LYNCH
Attorney General
of the State of California

ELIZABETH PALMER
Deputy Attorney General

JAY S. LINDERMAN
Deputy Attorney General

6000 State Building
San Francisco, California 94102
Telephone: (415) 557-1526

Attorneys for Appellees

SORG PRINTING COMPANY OF CALIFORNIA, 345 FIRST STREET, SAN FRANCISCO 94105

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JOHN C. MONTGOMERY, et al., *Appellees.*

On Appeal from the United States District Court for the Northern District of California

Motion to Affirm

Pursuant to Supreme Court Rule 16(1)(c), appellees in the above-entitled case hereby move to affirm on the ground that the questions presented are so unsubstantial as not to warrant further argument.

OPINION BELOW

The Memorandum Opinion of the court below is unreported, but is set forth in Appendix A, attached hereto.

STATUTES AND REGULATIONS INVOLVED

California Welfare and Institutions Code section 11351 is set forth in full in Appendix B. Regulations of the California State Department of Social Welfare, viz., Public Social Services Manual sections 42-515, 44-101, 44-113.23-.24, 44-133.5, are set forth in Appendix C.

Section 402(a)(7) of the Social Security Act [42 U.S.C. § 602(a)(7)], as it existed both before and after amendment in 1967, is set forth in Appendix D. The regulation of the Department of Health, Education & Welfare which purports to implement that section of the Social Security Act, is section 203.1 of Part 45, Code of Federal Regulations, and is set forth in Appendix E, together with its predecessor, now obsolete, sections 3131(7) and 3120 of Part IV, HEW Handbook of Public Assistance.

QUESTIONS PRESENTED

1. Can the Department of Health, Education and Welfare, by administrative regulation, preclude the State of California, in determining the extent of need of an AFDC[1] child, from considering income and resources of a stepfather or man "assuming the role of spouse" to the child's mother, when such a man is obligated by California law to support the child and when the Social Security Act requires California, in determining the child's need, to consider income and resources of any individual living in the home with the child?

2. The State of California legally obligates a stepfather and a man assuming the role of spouse to provide support

1. "AFDC" refers to the Aid to Families With Dependent Children program, which was established by the Social Security Act of 1935 (49 Stat. 620, as amended, 42 U.S.C. §§301-1394), and in which the State of California participates (Cal. Welf. & Inst. Code §§ 11200-488).

for the children of his "adopted family" if he is able to do so and if the family otherwise would require AFDC assistance. Consistent with that legal obligation and with the Fourteenth Amendment, can the State of California decrease the amount of public support of that family by the amount that the father or man assuming the role of spouse is obligated to provide it?

STATEMENT OF CASE

The appellants and intervenors-appellants are mothers and their children, all applicants for, or recipients of, public assistance pursuant to the Federal-State program of Aid to Families with Dependent Children (AFDC). The natural fathers of the children are absent from the homes but in each of the homes there is a "substitute" father who has establish a "marital" relationship with the mother in varying degrees of formality, some actually having married the woman, and others merely having assumed the role of spouse. For the purposes of this case, the legal issues do not turn on whether the woman has ceremonially married, or simply acquired a man assuming the role of spouse, and thus, we refer hereinafter to "Mrs. Lewis" as representative of all appellants.

The defendants-appellees are John C. Montgomery, the Director of the California State Department of Social Welfare, and various welfare officials of the California counties of San Francisco, Alameda and San Mateo.[2] We refer hereinafter to all appellees as "the State of California."

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2. The Aid to Families With Dependent Children program is administered by the County Welfare Department in accordance with the rules of the California Department of Social Welfare under the direction of Appellee John C. Montgomery.

Mrs. Lewis sought declaratory and injunctive relief against enforcement of California Welfare and Institutions Code section 11351 and related implementing administrative regulations.[3] That statute, and the regulations, impose upon a stepfather and upon a "man assuming the role of spouse" (hereinafter referred to as "MARS"), an obligation to support the children of his "wife"—ceremonial or common law—if he is able to do so and if without such support the children would be eligible for public assistance.

The asserted bases for the relief sought were that the California laws were contrary to the Social Security Act and implementing regulations of the Department of Health, Education and Welfare ("HEW"), and that the state laws caused denials of due process, equal protection, and right of privacy.

The State of California moved to disolve the three-judge court for lack of a substantial federal question and to dismiss the complaints without leave to amend for failure to state a claim. The motions were granted on December 19, 1968, and rehearing denied on March 12, 1969. A motion by the Secretary of Health, Education and Welfare to intervene also was denied on March 12, 1969.

THE CONSTITUTIONAL QUESTIONS PRESENTED ARE NOT SUBSTANTIAL

I. Introduction

The Aid to Families with Dependent Children (AFDC) program is a federal-state cooperative venture established by the Social Security Act of 1935 (49 Stat. 620, as amended, 42 U.S.C. §§ 301-1394) in which the State of California participates (see Cal. Welf. & Inst. Code §§ 11200-488).

3. See Appendices B and C for text.

Under the program, public assistance is provided to a "dependent child," defined by the Act as a "needy child . . . who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent" and who lives with one of a specified list of relatives. 42 U.S.C. § 606(a)(1965).

A pertinent provision of the Social Security Act, regarding the determination of eligibility of, and the computation of the amount of assistance to, a family with a dependent child, requires that

> "The State agency *shall,* in determining need, *take into consideration any other income and resources of any child* or relative claiming aid to families with dependent children, *or of any other individual (living in the same home as such child and relative)* whose needs the State determines should be considered in determining the need of the child or relative claiming such aid, as well as any expenses reasonably attributable to the earning of any such income. . . ." 42 U.S.C. § 602(a)(7), as amended by Social Security Amendments of 1967, Pub. L. No. 90-248, § 202(b), 81 Stat. 821 (emphasis added).

The dispute in this case centers on the issue of the method in which California "takes into consideration" the resources of the child when there is a stepfather or MARS present in the child's home. California obligates the stepfather or MARS to support the child if he is able and if, without support, the child would need AFDC assistance. Cal. Welf. & Inst. Code § 11351 (Appendix B). The man's ability to pay support is determined according to established standards of income and allowable deductions (see Appendix C). The amount of the AFDC grant is then reduced in the amount which is thereby determined to be, and is by law, available to the child.

The Department of Health, Education and Welfare, on the other hand, issued regulations in 1968 which purport to prohibit California from considering the income and resources of a MARS or stepfather as being available to a child, unless there is "proof of actual contributions." 45 C.F.R. § 203.1 (See Appendix E).

The conflict between the state and federal rules is clear. However, as the District Court held, there is no Supremacy Clause problem because the federal regulation is invalid and, therefore, the California law need not give way to it. Moreover, the California statute and administrative regulations comport with the requirements of the Fourteenth Amendment.

II. The HEW Regulation Contravenes the Command of the Social Security Act and Infringes Upon An Area Reserved to California For Determination and Is, Therefore, Invalid.

The Social Security Act commands the State of California, in determining the degree of need of children, to consider *any* other income and resources of any *child* or of *any other individual* living in the home with the child. 42 U.S.C. § 602, as amended, *supra*. California has complied with this directive by imposing a child-support obligation upon a MARS or stepfather (Cal. Welf. & Inst. Code § 11351). Thus, his net income is, by law, a resource of the child, which California considers in modifying the grant of aid to the child.

The Department of HEW requires, however, that despite the California-imposed legal support duty on *all* "fathers" —natural,[4] adoptive,[5] stepfather and MARS[6]—the State can

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4. Cal. Civ. Code §§ 137, 137.2. 139, 143, 196, 196a, 199, 230; Cal Pen. Code § 270.

5. Cal. Civ. Code § 228.

6. Cal. Welf. & Inst. Code § 11351.

consider the MARS' income only if it proves that the man actually pays for the child's support. 45 C.F.R. § 203.1(b). Thus, HEW has attempted to preclude California from considering resources of the MARS, which by California law are available to, and a resource of, the child. This regulation is in direct conflict with the directive of Congress and thus invalid. It was issued in excess of the delegated authority of the Secretary of HEW to make "rules and regulations not inconsistent with" the Social Security Act. 42 U.S.C. § 1302 (1965).

As this Court has articulated the underlying policy of the AFDC program, Congress intended to provide public assistance and reasonable economic security to children who lacked a "parent." A "parent" is a "breadwinner" and "an individual who owed to the child a state-imposed legal duty of support." *King v. Smith*, 392 U.S. 309, 329 (1968). Thus, to the extent that a "breadwinner" is present in the home, if he is obligated to support "his children," Congress reasonably expected that he, rather than the public, would provide the support. *King v. Smith, supra*, 392 U.S. at 329. California obligates MARS and stepfathers to provide support and shares Congress' expectation that they will do so.

Indeed, HEW appears to concur in this expectation—but only with respect to natural or adoptive parents or stepparents. 45 C.F.R. § 203.1. It allows California to assume the availability of income for the children of these ceremonially-married fathers provided that they are legally obligated by state law to support the child. Yet HEW disallows a similar assumption with respect to a MARS, even though in California he also is under a similar legal duty of support. The illogic of HEW's distinctions is apparent. It is not the degree of sanctity of the "marriage" of the father which should be determinative of the likelihood of

support of the child. The expectancy factor of forthcoming support rests on the state imposition of a support duty and not on whether or not there has been a church or courtroom marriage ceremony. This Court has noted the clear "intent of Congress that the only kind of 'parent,' under § 406(a), whose presence in the home would provide adequate economic protection for a dependent child is one who is legally obligated to support him." *King v. Smith, supra,* 392 U.S. at 332. A MARS in California is such a "parent" and California must, by the Act, consider his income and resources.

The Department of HEW can do no more than adopt regulations which will effectuate this will of Congress. "A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity." *Manhattan Gen. Equip. Co. v. C.I.R.,* 297 U.S. 129, 134 (1936). We acknowledge that the Secretary has the "power to fill up the details," *United States v. Shreveport Grain and Elevator Co.,* 287 U.S. 77, 85 (1932), of the Social Security Act, but "where, as in this case, the provisions of the act are unambiguous, and its directions specific, there is no power to amend it by regulation." *Koshland v. Helvering,* 298 U.S. 441, 447 (1936); and *cf. King v. Smith,* 392 U.S. 309, 333 n. 34 (1968).

Moreover, not only is the HEW regulation in conflict with the Social Security Act, it also violates the principle, clearly established by Congress, that the states have the prerogative to set the standards for determining "need," and thus, eligibility, under the AFDC program. The District Court has stated this in a succinct and cogent fashion as follows:

> "[T]his court also finds that the regulation, by dictating to the states the manner in which they shall consider income and resources, intrudes upon an area reserved by federal law and policy to the states. As the Supreme Court has noted, the 'AFDC program is based

upon a schen e of cooperative federalism.' *King v. Smith*, 392 U. S. at 316. Under this scheme, the states have the sole esponsibility for determining the standard of econom ic security. Moreover, the legislative history of the A t makes clear that the States have the sole power to determine who is needy. *Id.* at 319 n. 14. As one Repre sentative said during the floor debates, 'need is to be determined under the State law.' *Id.* at 319 n. 14. Ca ifornia has simply exercised the power that Congress intended the states to have. It is not for the Secretary to prohibit California from: (a) statutorily imposir g an obligation of support on the MARS to the extent f his ability; (b) determining that to this extent the ch ld is not needy; and (c) reducing the child's assista nce accordingly. As the Supreme Court has pointed ut, this authority was intended for the states prior t the Act's passage and has been reserved to the states by § 402(a) of the original Act, carried forward with out change in this respect to the present day. 42 U.S.C. § 602(a) (1967 Supp.)" Appendix A at 8-9, *infra*.

III. The California Budgetary Rules Comport With Fourteenth Amendment Requirements.

Mrs. Lewis com plains that California Welfare and Institutions Code sect on 11351 denies her due process of law because it create an irrebutable presumption that the MARS in her hon e actually is supporting her children and requires a reducti n in her AFDC grant accordingly. Jurisdictional Stateme t 19-26. Implicit in this argument is Mrs. Lewis' mistaken n tion that the AFDC program guarantees welfare assistanc to all legally fatherless children unless some man *actuall, is supporting* them. In other words, she urges that despit the presence in her home of a "breadwinner," whom t e California statute obligates to provide child support, she remains totally eligible for public assist-

ance unless that man wishes, and does, comply with the law by paying the support he owes.

However, this Court has explicitly stated that:

"The AFDC program, however, was *not* designed to aid *all* needy children. The plight of most children was caused simply by the unemployment of their fathers. With respect to these children, Congress planned that 'the work relief program and . . . the revival of private industry' would provide employment for their fathers. S. Rep. No. 628, 74th Cong., 1st Sess., 17 (1935). As the Senate Committee Report stated: 'Many of the children included in relief families present no other problem than that of providing work for the breadwinner of the family.' *Ibid.* Implicit in this statement is the assumption that children would in fact be supported by the family 'breadwinner.'

"The AFDC program was designed to meet a need unmet by programs providing employment for breadwinners. *It was designed to protect what the House Report characterized as '[o]ne clearly distinguishable group of children.'* H. R. Rep. No. 615, 74th Cong., 1st Sess., 19 (1935). *This group was composed of children in families without a 'breadwinner,' 'wage earner,' or 'father,'* as the repeated use of these terms throughout the Report of the President's Committee, Committee Hearings and Reports and the floor debates makes perfectly clear. To describe the sort of breadwinner that it had in mind, Congress employed the word 'parent.' 49 Stat. 629, as amended, 42 U.S.C. § 606(a). A child would be eligible for assistance if his parent was deceased, incapacitated or continually absent.

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"Congress must have meant by the term 'parent' an individual who owed to the child a state-imposed legal duty of support." *King v. Smith*, 392 U.S. 309, 328-29 (1968) (footnotes omitted) (emphasis added).

Mrs. Lewis' children are not ones whom Congress intended to benefit from AFDC since they live in a home with both a mother *and a (MARS) father* who *must* support them, and whom California, as Congress, assumes will support them. "*[T]he fact that the man in question does not actually support the child cannot be determinative,* because a natural *father at home may fail actually to support his child but his presence will still render the child ineligible* for assistance." *King v. Smith, supra,* 392 U.S. at 329 (emphasis added).

Thus the fact that Mrs. Lewis is "prohibited" from proving that the MARS is not, in fact, complying with the law and supporting the children is not a denial of due process. It does Mrs. Lewis no good to prove non-support because it is the MARS' presence coupled with his statutory support obligation which renders the family ineligible, or less eligible, for AFDC assistance. Actual support payments are not determinative.

Mrs. Lewis demonstrates displeasure with the *level* of income which application of the California law establishes. See Jurisdictional Statement 20-21. She complains that operation of the California law compels the MARS to "eschew any charities, activities, entertainments or other pleasures he might otherwise enjoy" and to "forego . . . his car, his television, and anything else, including real property, being purchased on installment credit . . . ." Jurisdictional Statement 20. As welfare recipients they claim the right to all of these things, plus the pleasures of "marriage," but with no formalities and no obligations attached. And they complain that the California laws which prohibit such an Elysian state, deny them due process. The argument is both novel and absurd. "There is no question that States have considerable latitude in allocating their AFDC

resources, since each State is free to set its own standard of need and to determine the level of benefits by the amount of funds it devotes to the program." *King v. Smith, supra,* 392 U. S. at 318-19 (footnotes omitted.) Mrs. Lewis should direct her efforts toward the California Legislature, and not this Court, in her desire to have the amount of welfare benefits increased.

Moreover, California's rules apply equally to all potential AFDC recipients. There is no denial of equal protection to MARS or to the children in their home. California obligates natural fathers, adoptive fathers, and stepfathers to support their children,[7] assumes that they will do so, and because of that obligation and assumption, the children are ineligible for AFDC. Exactly the same principles apply to MARS, as of course they must. To allow the child in the MARS household, but not the child whose parents are legally married, to continue to receive public assistance would be to deny equal protection to the latter class. The only distinguishing feature between a MARS and the other fathers is that the latter have formalized their marriage relationships. But since California compels them all to support their children, they all must be deemed to be "breadwinners" whose resources and presence in the home must be and are equally determinative of AFDC-eligibility.

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7. See nn. 4, 5, 6, *supra.*

CONCLUSION

The questions presented by this appeal are not substantial. Appellees move that the decision of the three-judge district court dismissing this action be affirmed.

Dated: September 4, 1969

Respectfully submitted,

THOMAS C. LYNCH
Attorney General
of the State of California

ELIZABETH PALMER
Deputy Attorney General

JAY S. LINDERMAN
Deputy Attorney General

6000 State Building
San Francisco, California 94102

Attorneys for Appellees

Appendix A

Opinion Below

In the United States District Court for the Northern District of California

Filed Dec. 23, 1968

GENEVER LEWIS, individually, and as general guardian of ANNETTE LEWIS and MANUEL LEWIS, and as representative of a class of unnamed plaintiffs similarly situated, *Plaintiff,* vs. PAULINE STARK, et al., *Defendants.*	Case No. 50238
MARGARET PERCY and MELVIN JONES, et al., *Plaintiffs,* vs. JOHN MONTGOMERY, et al., *Defendants.*	Case No. 50285

MEMORANDUM OPINION

Before: Hamlin, U. S. Circuit Judge, and Zirpoli and Wollenberg, U. S. District Judges

Plaintiffs seek in their own behalf and as representatives of their respective classes to have this court declare that section 11351 of the California Welfare and Institutions Code, and the related sections of the California Public Social Services Manual (PSSM), are contrary to federal regulations interpreting the Social Security Act and are unconstitutional.

The original plaintiffs in this action were Genever Lewis (Civ. No. 50238) and Margaret Percy (Civ. No. 50285). These plaintiffs sued on behalf of themselves, their children, a man assuming the role of spouse (MARS) in the Percy home, and all other individuals similarly situated. Motions to intervene were made prior to the date set for consolidated hearing, and those motions brought before this court two families with a stepfather instead of a MARS, as well as a third family with a MARS. By virtue of the circumstances of the original plaintiffs and the intervenors, leave to intervene would appear mandatory, Fed.R.Civ. Proc. 24(a). Any findings of this court contrary to the interests of the MARS would apply a fortiori to the stepfather. For this reason the motions to intervene in No. 50285 are granted to Virginia Sims, Mary J. Garner, Bertha Bell and their minor children, and to Humberto Garcia and his minor child, and Haywood Bell. For this reason also this court will refer only to the claims raised by the MARS and will not treat separately the claims of the stepfather, as we deem it unnecessary to do so.

I
INTRODUCTION

The federal government maintains in cooperation with the states, a program of assistance to families with dependent children (AFDC). According to one provision of the controlling federal statute, the Social Security Act, "A State plan for aid and services to needy families with children must . . . (7) provide that the State agency shall, in determining need, take into consideration any other income and resources of any child . . . claiming aid to families with dependent children, as well as any expenses

reasonably attributable to such income. . . ." 42 U.S.C. 602(a)(7). The federal government and the state of California are in disagreement as to the proper method of taking "into consideration any other income and resources of any child" when there is present in the family a "man assuming the role of spouse." Regulations issued by the Department of Health, Education and Welfare in August, 1968 permit a state to take into account contributions from a MARS only if there is "proof of actual contributions".[1]

California proceeds differently. It obligates a MARS to support the children in the home if he is able. "/A/n adult male person assuming the role of spouse . . . *is bound*

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1. 45C.F.R. § 203.1:

(a) A State plan for aid and services to needy families with children under part A of title IV of the Social Security Act to be approved under section 402 of such Act (42 U.S.C. 602), must provide that the determination whether a child has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, or (if the State plan includes such cases) the unemployment of his father, will be made only in relation to the child's natural or adoptive parent, or in relation to a child's stepparent who is ceremonially married to the child's natural or adoptive parent and is legally obligated to support the child under State law of general applicability which requires stepparents to support stepchildren to the same extent that natural or adoptive parents are required to support their children.

(b) The inclusion in the family, or the presence in the home, of a "substitute parent" or "man-in-the-house" or any individual other than one described in paragraph (a) of this section is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the State. As provided in Interim Policy Statement No. 4 (33 F.R. 10230, July 17, 1968), items 3.C.2(i) and (iii), and 6(ii), in the consideration of all income and resources in establishing financial eligibility and the amount of the assistance payment, only such net income as is actually available for current use on a regular basis will be considered, and the income only of the parent described in paragraph (a) of this section will be considered available for children in the household in absence of *proof of actual contributions.* (Emphasis added).

to support, if able to do so, his wife's children if without support from such . . . adult male person they would be needy children eligible for aid under this chapter." Cal. Welf. & Inst. Code § 11351 (emphasis added).[2] The MARS' ability is determined by the state according to established categories of allowable income and deductions. Under California's statute and regulations, the amount of assistance to the needy family is reduced by the amount of income which the state has computed to be available from the MARS.[3] Under the HEW regulations, the amount of assist-

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2. Section 11351 reads in full as follows:

"Where a needy child lives with his mother and a stepfather or an adult male person assuming the role of spouse to the mother although not legally married to her, the amount of the grant made pursuant to Section 11450 of this code shall be computed after consideration is given to the income of the stepfather or such adult male person. The county granting aid shall determine if the stepfather or such adult male person is able to support the child either wholly or in part. The determination shall be based upon a standard which takes into account the stepfather's or such adult male person's income and expense under regulations adopted by the department.

Notwithstanding the provisions of Section 209 of the Civil Code, a stepfather or such adult male person is bound to support, if able to do so, his wife's children if without support from such adult male person they would be needy children eligible for aid under this chapter. However, such liability for support shall not exceed the wife's community property interest in his income.

A natural father is not relieved of any legal obligation to support his children by the liability for their support imposed upon their stepfather by this section.

As used in this section, 'adult male person' means any male person of age 18 years or older."

3. The statute is set forth in note 2, *supra.* The following regulations are contained in the Public Social Services Manual:

42-535 Responsibility of man assuming the role of spouse.

AFDC .1 *Definition—Man Assuming the Role of Spouse*

A man will be considered to be assuming the role of spouse if it has been found that he is not married to the mother and not the father of any of her children, but that:

.11 He is in or around the home and is maintaining an intimate relationship with the mother; *and*

.12 Either he has assumed substantial financial responsibility for the ongoing expenses of the *AFDC* family; *or*

ance may be reduced only by the amount of proved contributions. Thus the situation can arise in California where

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.13 He has represented himself to the community in such a way as to appear in the relationship of husband or father, or both.

.2 *Responsibility of Man Assuming Role of Spouse for Support* The man assuming the role of spouse is responsible for the support of:

.21 His children

.22 To the extent of his ability, the mother and her needy children. He is *not* included in the Family Budget Unit with the mother.

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44.133 Treatment of Income (Continued)

AFDC .5 *Income of Unmarried Father and a Man Assuming the Role of Spouse*

.51 The amount the unmarried father or man assuming the role of spouse is able to contribute to the *AFDC* family is net income to the FBU.

.52 In situations in which the children of the unmarried father and mother are eligible for *AFDC* on the basis of unemployment or incapacity of the unmarried father, all the children of either parent in the home may be eligible for *AFDC*. In such cases the unmarried father and the mother and all the children are included in the FBU and all income of these persons is income to the FBU.

.53 In all other situations, the ability of either the unmarried father or the man assuming the role of spouse to contribute to the FBU is determined as follows:

Step 1. Determine total need in accordance with the AFDC assistance standard for the family consisting of the members of the FBU, the unmarried father or man assuming the role of spouse, and his children living in the home.

Step 2. Determine total need of the FBU.

Step 3. Compute the difference between the two budgets to determine the amount that represents the need of the unmarried father or man assuming the role of spouse for purposes of establishing his responsibility to meet his own needs and the extent of his responsibility to contribute to the FBU.

Step 4. From the needs determined in *Step 3*, deduct his net income computed in accordance with Section 44-113 to establish his ability to contribute to the FBU.

a. If his income exceeds the need, the excess is income to the FBU.

b. If his income does not exceed the need, there is no income to the FBU. His children are needy and may qualify for AFDC as a separate case if his income is less than the need.

the state will regard the family to be living on money which the MARS is actually spending for purposes not recognized by the allowable deductions (living expenses, job-related expenses, court-ordered child support payments and medical care). Therefore, despite the presence in the home of a MARS earning sufficient income to support the family, the family may still be in actual need. Under the HEW regulations the family is considered needy; under California law it is not.

Plaintiffs, representing mothers, children, stepfathers, and MARS in families whose assistance has been modified under California's statute and regulations cite the HEW regulation, and the equal protection clause, the due process clause, and the right to privacy as bases for overturning the California practice to which they object. Plaintiffs seek a temporary order restraining the enforcement of the California budgetary rules, and declaratory and injunctive relief. This three-judge court was convened pursuant to 28 U.S.C. §§ 2281, 2284, and jurisdiction rests on 42 U.S.C. § 1983. Defendants have moved to dissolve the three-judge court for lack of a substantial federal question and to dismiss the complaint without leave to amend for failure to state a claim.

II
HEW REGULATIONS

Plaintiffs contend that the HEW regulations must prevail over the California practice because the regulations were adopted pursuant to an act of Congress. We disagree, for we find the California practice, and not the HEW regulations, to be in accord with the Social Security Act. As mentioned above, the Act requires the states, in determining need, to consider "any other income and resources

of any child." 42 U.S.C. § 602(a)(7). The Act does not instruct states to consider only resources guaranteed by the legal consequences of a marital or biological relationship. Nor does the Act instruct the states to consider only resources whose receipt by the child has been proved.

The HEW regulations, however, bar from state consideration resources controlled by a MARS. It is just these resources that California takes into account under Welf. & Inst. Code § 11351. The statute obligates the MARS to support the children in the home to the extent he is able to do so and modifies the amount of assistance to the extent of the MARS' ability. In light of this statutory obligation, income to the MARS beyond his expenses is *by law* a resource of the child. For California to ignore this resource would be to violate rather than conform to the Social Security Act. By withholding from California's consideration certain resources of the MARS, available according to the State's determination and applicable by law to the support of the child (although not proved to have been actually thus employed), the HEW regulations contravene the command of § 602(a)(7) to consider "other resources of the child." It is therefore California that is in conformity with the Social Security Act. The HEW regulations, having been issued contrary to the congression mandate, are, in the view of this court, invalid. They exceed the Secretary's authority to make "rules and regulations not inconsistent with" the Social Security Act. 42 U.S.C. § 1302. The Secretary has, of course, the "power to fill up the details" *United States v. Shreveport Grain and Elevator Co.*, 287 U.S. 77, 85 (1932), but he is nevertheless "required to follow Congressional mandate, whether explicit or ascertainable in underlying policy." *United Steel Workers of America v. N.L.R.B.*, 390 F.2d 846, 851 (1968). The

Supreme Court recently articulated the underlying policy by saying "that Congress expected 'breadwinners' who secured employment would support their children. This congressional expectation is most reasonably explained on the basis that the kind of breadwinner Congress had in mind was one who was *legally obligated* to support his children." *King v. Smith,* 392 U.S. at 329, (emphasis added). The HEW regulation, by requiring proof of actual contributions from a MARS, reduces the expectation of Congress to a mere hope. California, on the other hand, shares the congressional expectation. By creating a rule out of harmony with the enabling statute, HEW has created a mere nullity. *Manhattan General Equipment Co. v. C.I.R.,* 297 U.S. 129, 134 (1936). California, therefore, is not in conflict with any valid federal law.

In addition to upholding the California practice for the reason that the HEW regulation violates the policy of the Social Security Act, this court also finds that the regulation, by dictating to the states the manner in which they shall consider income and resources, intrudes upon an area reserved by federal law and policy to the states. As the Supreme Court has noted, the "AFDC program is based upon a scheme of cooperative federalism." *King v. Smith,* 392 U.S. at 316. Under this scheme, the states have the sole responsibility for determining the standard of economic security. Moreover, the legislative history of the Act makes clear that the States have the sole power to determine who is needy. *Id.* at 319 n.14. As one Representative said during the floor debates, "need is to be determined under the State law." *Id.* at 319 n.14. California has simply exercised the power that Congress intended the states to have. It is not for the Secretary to prohibit California from; (a) statutorily imposing an obligation of

support on the MARS to the extent of his ability; (b) determining that to this extent the child is not needy; and (c) reducing the child's assistance accordingly. As the Supreme Court has pointed out, this authority was intended for the states prior to the Act's passage and has been reserved to the states by § 402(a) of the original Act, carried forward without change in this respect to the present day. 42 U.S.C. § 602(a) (1967 Supp.)

III
EQUAL PROTECTION

Plaintiffs claim that the challenged provisions of California's welfare program deny equal protection to two classes: (1) needy children who reside with a MARS, and (2) the MARS himself. The thrust of plaintiffs' objection is that the classifications drawn by the legislature are not reasonably related to the purposes of the statute, and that it is unconstitutional to impose on the children and the income-earning MARS in a family receiving AFDC payments a burden that is not imposed on AFDC children without an income-earning MARS or on a MARS living with a non AFDC family.

In resolving conflicts turning on equal protection, this court is guided by the content given to the equal protection clause by the United States Supreme Court. In *Morey v. Doud,* 354 U.S. 457, 463-64 (1957), the Court offered four rules for testing discrimination in social legislation. First, the equal protection clause does not deprive the states of a "wide scope of discretion", and a statute having a reasonable basis will be upheld. Second, a failure of "mathematical nicety" or the creation of "some inequality" is not offensive to the equal protection clause. Third, a classification will be sustained "if any state of facts reasonably can be

conceived that would sustain it." Fourth, the burden is on the attacker to show no reasonable basis. This test has been applied to strike down a state statute excepting a named company from state regulation, *Morey v. Doud, supra;* to strike down a state rule prohibiting illegitimate children from bringing a wrongful death or survival action for the death of their mother, *Levy v. Louisiana*, 391 U.S. 68 (1968); and to strike down a state rule selectively prohibiting the mother of an illegitimate child from recovering for injury or death to the child in some circumstances but not in others, *Glona v. American Guarantee & Liability Ins. Co.*, 391 U.S. 73 (1968). The Supreme Court could find no possible rational basis for these legislative classifications.

Turning to the contentions raised by plaintiffs in the present case, this court first finds that there is no discrimination of any sort in regard to the AFDC children. Plaintiffs complain that the mere presence of the MARS puts the children in an "inferior status", and seek vindication by making an analogy to the *King* case. Plaintiffs' line of argument is erroneous for the reason that the modification of assistance takes place equally for all AFDC children if they have other resources available to them. Children in a MARS family are not discriminated against. They receive equal treatment with all other children receiving AFDC assistance.

Plaintiffs' analogy to the *King* case and characterization of the California practice as a subtle version of Alabama's statute are highly inaccurate. In *King*, the man found by Alabama to be a substitute father lived with his own family and made no income or resources available to the supposed "substitute" child and its mother and clearly had no ability to contribute to their support. Worse, the Alabama regulation made deprived children ineligible for aid due solely to the sexual conduct of their parent. Thus, the *King* case

raised "only the question whether the State may deal with these problems [of immoral conduct and illegitimacy] in the manner it has here—by flatly denying the AFDC assistance to otherwise eligible dependent children." 392 U.S. at 320.

This case is quite different. Here we have a California statute and regulations which deal with a man who actually is "in or around the home" and either assumes financial responsibility or represents himself to the community as the husband or father, not one who, as in *King*, had an occasional rendezvous with the mother. More importantly, California does not disqualify otherwise eligible needy families for aid because of the mother's sexual behavior; it simply considers the man's income in computing the welfare grant. It provides for a reduction of payments to the extent the man has *actual* ability to support.[4] The state of California does not reduce welfare grants because of the frequency of sexual relations or the presence of illegitimate children, but because of the actual presence of a breadwinner in the home of the applicant or recipient of aid. That breadwinner must, if able to do so, support his "adopted" child.[5]

Thus, California, unlike Alabama, does not deny or modify AFDC grants to "destitute children who are legally fatherless . . . on the transparent fiction that they have a substitute father." 392 U.S. at 334. California determines whether a legally fatherless child is destitute before granting, limiting or denying aid, and that determination includes the 'reasonable' inquiry whether the child has a MARS to look to for support which the state obligates him to provide.

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4. See note 3 *supra*.

5. See note 2 *supra*.

This court can easily conceive of rational purposes that justify the modification of assistance in light of a MARS' net income. To the extent that the number of beneficiaries and the amount of their assistance can be reduced according to their administratively determined need, it may be possible to increase the amount of assistance to other recipients whose needs are not met by the present level of assistance without increasing the level of appropriations. Also, it is certainly permissible for any program of government spending to minimize expense where possible, and the net income of a MARS living with recipient children is a rational incident for such expense minimization.[6]

It is not invidious for the legislature to eliminate the financial bonus that would, in the absence of California budgetary rules, accrue to unmarried couples receiving AFDC benefits. In the absence of the obligation imposed by Welf. & Inst. Code § 11351, a MARS could engage in all aspects of family life while shifting the expense of supporting the children in the home from himself to the state. By imposing the support obligation on the able MARS, the state was justifiably eliminating this evasionary device.

Moreover, in cases where the AFDC child's natural father has established a new family, the legislature was making the socially advantageous choice of permitting the natural father to devote his resources to his new family so long as the MARS is able to provide support for the AFDC family.

In this context, the court is unable to say that California acts toward AFDC recipients in a MARS family in a way that is invidiously discriminatory. *Levy v. Louisiana, supra.* The plaintiffs have failed to discharge their burden of showing that the California budgetary rules have no reasonable

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6. See Lewis & Levy, *Family Law and Welfare Policies: The Case for "Dual Systems"*, 54 Calif. L. Rev. 748, 775-76 (1966).

basis. We therefore find that the program for assistance modification does not deny AFDC children equal protection of the laws.

Plaintiffs' second argument that the MARS is denied equal protection is likewise without merit. Plaintiffs contend that, because the support obligation of a MARS exists only for children receiving AFDC assistance, the MARS in a welfare family is treated differently from a MARS in a nonwelfare family. This contention is of course true, but it is also irrelevant. The obligation imposed on the MARS in an AFDC family is part of a comprehensive pattern of child-support statutes directed variously at natural parents, Cal. Civ. Code §§ 137, 137.1, 137.2, 139, 143, 196, 196a, 199, 230, and Cal. Pen. Code § 270; adoptive parents, Cal. Civ. Code § 228; and stepfathers and men assuming the role of spouse, Welf. & Inst. Code § 11351. These obligations differ according to need and to the nature of the "parental" relationship. To be sure, a MARS in a non-AFDC family is free of support obligations. But this court cannot say that the "discrimination" against the MARS in the AFDC family results from a distinction that has no relevance to the purpose for which the classification was made. *Rinaldi v. Yeager*, 384 U.S. 305, 309 (1966). It is not invidious for the legislature to recognize that in a society of many cultures and many impoverished individuals, perfectly stable, though informal, families will inevitably arise.[7]

This court is not unaware that the state's policy may induce some men to depart from the home so that the family may continue to receive welfare payments without reduction for amounts determined by the state to be contributed by the

7. tenBroek, *California's Dual System of Family Law (III)*, 17 Stan.L.Rev. 614, 617-19 (1965).

MARS. Men who respond to this inducement undoubtedly deprive themselves of the resources of family life and may also create a less advantageous situation for the children because of their absence. Nevertheless, this court cannot say that the California legislature has been wholly arbitrary in incurring this risk. As some commentators have observed, the only employable males likely to be thus influenced to forsake their "families" would be "(1) those who would rather use their own income on themselves to the exclusion of their families, and (2) those who would be tempted to desert their families simply because the taxpayers' contribution to the family's income is eliminated."[8] This court cannot say that California has acted arbitrarily or wholly irrationally in choosing to risk the continued existence of such tenuous families rather than encourage irresponsible males to shirk the responsibilities which society has chosen to impose on family breadwinners. To be sure, "any policy is likely to produce some undesirable side effects",[9] but we believe that these consequences are within the boundaries of the equal protection clause. Plaintiffs' second objection, therefore, must fail.

IV
DUE PROCESS

Earlier in this opinion, we mentioned the possibility that California will regard a family seeking AFDC assistance as living on money deemed available from the MARS even though actually put to other uses. This situation arises where the MARS makes expenditures that are not covered

8. Lewis & Levy, *supra*, note 6, at 779-80.
9. *Id.* at 776.

by the state-allowed deductions for living expenses, job-related expenses, court-ordered child support paymetns, and medical care. Money spent for other, non-deductible, purposes is deemed by the state to be net income available to the family. Under Welf. & Inst. Code § 11351, such net income is required to be applied to the needs of the family. To the extent of such net income, therefore, the state reduces the amount of assistance to the AFDC family. The state does not abstain from making the reduction though the MARS fails to apply his net income to the family. Plaintiffs contend that this, the State's refusal to consider that MARS' income is not being applied to the needs of the AFDC family is a denial of due process.

Plaintiffs' argument has an initial attraction. One rebels at the notion that the State may assume facts that do not exist and then reduce benefits on the basis of those non-existent facts. Yet closer analysis entirely dispels the persuasiveness of plaintiffs' claim.

First, we repeat that payments from an able MARS are compelled by law. If the state assumed the availability of resources whose application to the needs of the family were not required by law, that would present a different case. Here the MARS is under a legal obligation to support the children. Welf. & Inst. Code § 11351. We are reluctant to prohibit the state from operating on the assumption that the law has been complied with. Nor are we in a position to deny to the state a logical method for encouraging compliance with the law. As one authority has observed, the practice of budgetary modification was adopted not so much to measure contributions actually being made as to see to it that contributions were made.[10]

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10. tenBroek, *supra*, note 7, at 657.

Second, we conclude that even if the available deductions have been too narrowly drawn to suit the preferences or style of life of some MARS, the effort to enlarge these categories must be directed to the legislature, not the courts. The days are over when the due process clause may be used to strike down state laws thought "unwise, improvident, or out of harmony with a particular school of thought". *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488 (1955). We admit that the assumption of available resources will accurately reflect the facts for one particular family but not for another. Similarly, however, the restriction of certain optical practices to licensed opthalmologists or optometrists will accurately reflect the ability of one particular unlicensed person but not of another. *Williamson, supra.* Again, permitting only practicing lawyers in the state to engage in "debt adjusting" may accurately reflect the abuse that would otherwise be imposed on distressed debtors by one particular nonlawyer, but not by another. *Ferguson v. Skrupa*, 372 U.S. 726 (1963). In light of these Supreme Court decisions upholding irreversible determinations as to the undesirability of allowing unlicensed persons and nonlawyers to engage in certain activities, this court must uphold over due process objections, California's irreversible determination that a MARS' net income, as computed by the state, is available to AFDC recipients.

V

RIGHT OF PRIVACY

Plaintiffs' final contention is that enforcement of the state's budgetary rules violates a MARS' right of privacy. We agree that the state's program may intrude into the private life of the MARS to determine whether he is maintaining an intimate relationship with the mother and to

ascertain his financial status. We also agree that the "notions of privacy surrounding the marriage relationship" protect that relationship from certain intrusions. *Griswold v. Connecticut*, 381 U.S. 479 (1965). Nevertheless, plaintiffs have failed to demonstrate that the practices of the state would be shown at trial to resemble the methods necessary to prove use of contraceptives, which methods were firmly rejected as "repulsive" by the Supreme Court. Proof of an intimate relationship, as required by the California regulations, is a far different matter, and does not require nearly so extensive or detailed an inquiry into the practices of the man and woman. California's regulations therefore fall without the "zone of privacy" recognized in *Griswold* and are not unconstitutional. What we have just said about the inquiry into "intimate relationship" applies a fortiori to the inquiry into the MARS' finances, an inquiry little different from that required for the enforcement of federal and state taxation. This fourth contention of plaintiffs must therefore fail.

VI

California's budgetary rules obligate a man assuming the role of spouse to contribute his income, to the extent that he is able, to an otherwise needy AFDC family. To the extent of the MARS' administratively determined ability, the grant to the AFDC family is reduced. Although this practice conflicts with a recent HEW regulation requiring proof of actual contributions, we sustain it because we find the HEW regulation to be inconsistent with the language and policy of the Social Security Act, an unfounded intrusion into a province reserved by the Act and its legislative history for the states, and therefore invalid.

We further find that California's practice is not prohibited by the equal protection or due process clauses of the constitution, or by the right to privacy announced in *Griswold v. Connecticut*. We therefore find that plaintiffs have not, under color of any state statute, been deprived of any rights secured by the constitution, and that this complaint seeking relief under 42 U.S.C. § 1983 must be dismissed for failure to state a claim upon which relief can be granted. The motions to intervene having been granted, this dismissal is effective as to both the original plaintiffs and the subsequent intervenors.

The dismissal of the complaint renders unnecessary consideration of any of plaintiffs' motions for relief.

In view of the disposition of plaintiffs' claims, this three-judge court is hereby dissolved.

Dated: December 19, 1968

O. D. HAMLIN
United States Circuit Judge

ALFONSO J. ZIRPOLI
United States District Judge

ALBERT C. WOLLENBERG
United States District Judge

Appendix B

California Welfare and Institutions Code Section 11351.

Where a needy child lives with his mother and a stepfather or an adult male person assuming the role of spouse to the mother although not legally married to her, the amount of the grant made pursuant to Section 11450 of this code shall be computed after consideration is given to the income of the stepfather or such adult male person. The county granting aid shall determine if the stepfather or such adult male person is able to support the child either wholly or in part. The determination shall be based upon a standard which takes into account the stepfather's or such adult male person's income and expenses under regulations adopted by the department.

Notwithstanding the provisions of Section 209 of the Civil Code, a stepfather or such adult male person is bound to support, if able to do so, his wife's children if without support from such stepfather or adult male person they would be needy children eligible for aid under this chapter. However, such liability for support shall not exceed the wife's community property interest in his income.

A natural father is not relieved of any legal obligation to support his children by the liability for their support imposed upon their stepfather by this section.

As used in this section, "adult male person" means any male person of age 18 years or older.

Appendix C

Regulations of California State Department of Social Welfare Appearing in "Public Social Services Manual."

42-515 DEFINITIONS FOR PURPOSES OF SUPPORT RESPONSIBILITY

.1 *Parents*

The natural parents, married or unmarried, are the parents of the child unless the child has been adopted. The adoptive parents are the parents thereafter.

.2 *Stepfather*

A stepfather is a man who is married to the mother of a child of whom he is not the natural father.

.3 *Unmarried Father*

An unmarried father is a man who is not married to the natural mother of one or more of their children even though he may be married to another woman.

.4 *Man Assuming the Role of Spouse*

.41 *Definition*

A man will be considered to be assuming the role of spouse if it has been found that he is not married to the mother and not the father of any of her children, but that:

.411 He is in or around the home and is maintaining an intimate relationship with the mother; *and*

.412 Either he has assumed substantial financial responsibility for the ongoing expenses of the AFDC family; or

.413 He has represented himself to the community in such a way as to appear in the relationship of husband or father, or both.

.42 *Criteria*

The determination of whether the man has assumed financial obligations or has represented himself as

spouselike shall include but shall not be limited to consideration of the following factors. The existence of a single factor may not be conclusive proof that the criteria are met. A man may take the children on outings, provide gifts or even discipline them. This fact alone would not be proof of a spouselike relation ship.

.421 Man has Assumed Financial Obligations

a. Man has paid family bills, opened charge accounts jointly or in his name for use of the family, or similarly obtained credit for the benefit of the family.

b. The man has paid medical or other bills incurred by the family.

c. Man has claimed mother and children as dependents in filing income tax.

.422 Man Represents Self as Spouselike

a. Representation to others, such as landlords, friends, community, as husband and wife.

b. Use of man's name by children for various purposes, including school records.

c. Man's attendance as parent at children's school function.

d. Man is attentive to children (other than casually) and provides recreation, gifts, etc., or admittedly disciplines children.

e. Children refer to man as father.

f. Substantial use of man's automobile by *AFDC* family or registration in man's and mother's names.

g. Use of AFDC family's address by man for mail, employment records, hospitalization, arrests, etc.

h. No demonstrable or confirmable alternative living arrangement other than with the AFDC family.

.43 *Substantiation of Relationship*

If the man has assumed financial obligations and/or represented himself as spouselike but there is no proof that he has been in a spouselike relationship, the presumption of a spouselike relationship does not exist and the county has the burden of proving that the man has assumed the role of spouse.

.5 *Common-Law Marriage*

California law, in Civil Code Section 63, recognizes any out-of-state marriage as valid as long as it is valid where contracted or performed. In cases in which there was no formal marriage, it may be that a common-law marriage was established in another state. If the parents state they are married to each other, it is assumed that they are lawfully married unless this is refuted by other evidence.

Interpretation

Basic Requirements - Common-law Marriages

In most of the states which recognize common-law marriages, two basic requirements must be met:

1. *Agreement Must Exist to Become Husband and Wife.* This agreement may consist of a written contract, but usually is just a simple, oral statement such as "I take you for my wife" or "You are now my wife." The words used must be in the present tense, and must express an intent to assume the relationship of husband and wife at the time involved and not at some future time. The parties have capacity to enter the agreement. This means that (1) they must be of sound mind; and (2) they must be of the minimum age. At common law and in most states which recog-

nize common-law marriage, the ages are 14 for the male and 12 for the female.

2. *Must be Cohabitation Following the Verbal or Written Statements.* Cohabitation is described as living together as husband and wife, each assuming the marital duties implicit in the relationship, usually including but not necessarily predicated on, sexual relations.

If these two facts are established and the state where they occurred recognizes common-law marriages, a marriage is in existence which is valid for all purposes in California and which can only be dissolved by formal divorce even in the state in which it was created. There is no such thing as an informal divorce in the United States.

44-101 INCOME DEFINITIONS

Income, generally, is any benefit in cash or in kind which is in fact currently available to the individual or is received by him as a result of current or past labor or services, business activities, interests in real or personal property, or as a contribution from persons, organizations or assistance agencies. To be considered in determining the AFDC aid payment, income must, in fact, be currently available to needy members of the family in meeting their needs during the budget period. Subject to this limitation and the exemptions and exclusions, as specified in Section 44-111 of this chapter, such benefits are taken into consideration as income in evaluating the need of the recipient and in determining the amount of assistance to which he is entitled.

.1 *Separate Income*

.11 Separate income is derived from an interest in separate property; or,

.12 Income resulting from employment or military service rendered prior to the present marriage.

.2 *Community Income*

.21 Community income is generally income derived from an interest in community property; or,

.22 Income resulting from employment or military service performed during the present marriage or being performed at the time of the present marriage. *However:* If the applicant or recipient of *AB, APSB, ATD* or *OAS* has relinquished his community interest in his spouse's earnings by oral or written agreement, such income is separate income of the spouse. If it is determined that the agreement was made for the purpose of qualifying for aid or for a greater amount of aid, such income is considered community income. Earnings of an ineligible spouse up to $200 monthly net are not considered as community income. (See Section 44-131.132 and W&IC 11012); or

.23 Income from the earnings of a minor child in the home unless the child is free from parental control.

.3 *Current Income*

.31 *Current income of a recipient* is income received in the current month regardless of the period over which it accrued. *However:* (1) interest payments in decreasing amounts may be averaged; (2) if all or a portion of a cash gift or a non-recurring lump-sum payment is determined to be income, it is considered "current income" in the month following receipt (see Section 41-309.3); (3) recurring lump-sum income is considered "current income" in the

months to which it is apportioned, starting with the month following its receipt (see Section 44-135.)

Any unexpended portion of current income becomes personal property on the first of the month following receipt of the income.

.32 *Current income of an ineligible spouse* is income received in the current month regardless of the period over which it accrued. Income which is temporary, received periodically, or fluctuates substantially from month to month, shall be treated as current income by converting it to a single monthly money amount based on an average of the anticipated income for the calendar year. This single amount shall be considered as the continuing monthly income from such source until a redetermination is made because of a change in circumstances not anticipated in the original determination. (For Net Income, see Section 44-113. For Division of Income with Spouse and Minor Children, see Section 44-131.1.)

Interpretation—The fact that the actual amount of income received by the ineligible spouse in a given month varies up or down from the estimated average does not mean that the determination regarding allocation to the recipient is necessarily incorrect. As long as the estimated average is a valid one, such estimated income is treated in the same manner as if it were actually received that way.

The reporting responsibility of the recipient and spouse must be considered carefully and agreed upon with them. It will generally be desirable to have all actual amounts of income received by the ineligible spouse reported monthly so that any substantial increase or decrease which would materially alter the anticipated average for the year can be considered and, when indicated, adjustment in the projected average made.

When the income of the ineligible spouse has been determined by reasonable estimate, the amount so determined is not subject to adjustment or correction on an after-the-fact basis with respect to aid already paid except as follows:

1. When the predicted income decreases substantially in a manner not anticipated and such decrease is reported promptly; or

2. When the information on which the estimate was based was incorrect or became incorrect as the result of the recipient and/or his spouse withholding or misrepresenting facts which resulted in the recipient receiving aid to which he was not entitled.

.4 *Casual Income and Income from an Inconsequential Resource*

.41 *Casual income* and inconsequential assistance is income in cash or in kind which is: (1) unpredictable as to amount and time of receipt; (2) of short duration; and (3) of negligible importance in meeting continuing needs under the appropriate aid standard.

.42 *Income from an inconsequential resource* is the net return from an interest in real or personal property which makes no appreciable contribution to the continuing needs of a recipient under the aid standard. (W&IC 11009)

Interpretation—Casual income, inconsequential assistance, and income from an inconsequential resource are excluded by code from consideration as income in determining the amount of the assistance payment.

The Federal Social Security Act provides that in determining need, "any income and resources" of the individual must be considered except a specified amount of earned income. It is not possible to define casual income

or income from an inconsequential resource in terms of specific money amounts, a percentage of the grant, a specific number of days employment or any other such method which would tend to minimize individualization of the determination. Rather, circumstances must be evaluated in relation to the individual case to determine if the income is really insignificant and of negligible importance in meeting the needs of the recipient.

The following examples illustrate some types of income which usually are considered casual income or income from an inconsequential resource:

a. Income from occasional labor and services of a temporary nature and which offer no security as a regular source of maintenance.

b. Income from occasional sale of products or resulting from work engaged in wholly or primarily for its therapeutic value, such as knitting, art work, cabinet work, etc.

c. Income from occasional rental of a room which is not ordinarily advertised or listed for rent and which is rented for a short period only.

d. The value of the usual small gifts in kind given in commemoration of holidays and anniversaries; or a gift in kind earmarked for a specific purpose and not useful for meeting the continuing needs of the recipient, such as a gift of a ticket for a trip. Gifts of personal property such as a radio, refrigerator, etc. (Irregular nonrecurring gifts of money are considered personal property pursuant to W&IC 11157.)

e. Returns from home produce from garden, orchard, farm livestock, poultry, firewood, etc., which is sold or exchanged.

f. Interest on securities which has no appreciable significance in meeting continuing needs.

g. Result of occasional barter transactions, such as the exchange of wood produced on the recipient's property for work on the road leading to his house.

h. Dues and membership fees in benevolent, fraternal or other non-profit organizations which are assumed by the organization or by another person on behalf of the recipient.

i. Emergency relief granted a recipient who has lost or spent his grant.

j. Interest on a savings account in a bank, savings and loan association, or other institution authorized to accept savings. (W&IC 11009)

k. Free board and lodging received by a recipient during a temporary absence from his home of not more than one month. (W&IC 11009.1.)

.5 *Earned Income*

Earned income is income received in cash or in kind as wages, salary, commissions or profit from activities such as business enterprise, farming, etc., in which the recipient is engaged as a self-employed individual or as an employee. It includes earnings over a period of time for which settlement is made at one given time, as in the instance of sale of farm crops, livestock or poultry (other than sale of an entire holding). (See Section 44-135.)

Returns from personal or real property, such as net income from rental of rooms, or board and room are considered "earned income" if such returns result from an appreciable and continuous effort on the part of the applicant or recipient.

.6 *Voluntary Contributions*

A voluntary contribution is a contribution for which the contributor has no legal liability. In *ADFC* and *OAS* a contribution by a child is "voluntary" only to the extent that it exceeds the child's legal liability. (See regulations on Responsible Relatives.) Income allocated to an *AB, APSB, ATD* or *OAS* recipient by his spouse as provided in Section 44-131.132 is not considered a "voluntary contribution." However, a contribution to the recipient by a spouse from income which the spouse would otherwise be permitted to retain for his own support, is considered to be voluntary.

.7 *Recurring Lump-Sum Income*

Recurring lump-sum income is: (1) income accrued over two or more months and expected to be received at intervals in the future; and (2) a recurring benefit received less frequently than monthly.

Interpretations—Recurring lump-sum income may include payments received from sources such as crops, pensions, rentals, contributions to meet taxes, stock dividends, salaries, wages or commissions and trust fund payments. Recurring lump-sum income does *not* include:

a. Income received monthly, including any initial lump-sum payment which will be followed by monthly payments from the same source such as OASDI. (Such income is applied toward meeting needs in the month of receipt and any unexpended balance becomes personal property on the first of the following month.)

b. Rental or similar payments covering a one-month period, but received less frequently than

monthly because of vacancies, etc. (Such payments are considered in the same manner as income received monthly.)

.8 *Income in Kind*

Income in kind is any benefit received other than in cash. It includes the value of need items provided at no charge. In *AB, APSB, ATD* and *OAS,* it includes the value of need items which a person, home or institution is obligated to provide the recipient pursuant to a partial life care contract, life lease or other agreement.

44-113 INCOME

.23 *Earnings—AFDC*

In order that the use of family income for expenses entailed in employment will not reduce the money available to meet basic and other needs, such expenses are to be deducted from gross earnings as follows:

.231 All involuntary deductions made by the employer.

.232 The standard allowance for food, clothing, and personal incidentals for employment as set forth in the following table:

TABLE OF STANDARD ALLOWANCES FOR FOOD, CLOTHING AND PERSONAL INCIDENTALS RESULTING FROM EMPLOYMENT

Monthly Take-Home Pay	Standard Allowance	Monthly Take-Home Pay	Standard Allowance	Monthly Take-Home Pay	Standard Allowance
$4 or less	All income	$13	$11	$22	$18
5	$ 4	14	12	23	19
6	5	15	12	24	20*
7	6	16	13	25	21
8	7	17	14	26	21
9	8	18	15	27	22
10	8	19	15	28	23
11	9	20	16	29	24
12	10	21	17	30	25**

* Maximum allowance for children under age 18.
** Maximum allowance for adult or children age 18 through 20.

.233 All other expenses incurred to retain employment. Such expenses include the cost of:

a. Transportation to and from work and on the job if not reimbursed by the employer.

b. Tools and licenses required for the job.

c. Dues to unions, business organization, employee clubs, or similar assessments.

d. Contributions to collections for employee benefits necessary to holding the job.

e. Necessary educational or training expenses related to employment including any necessary publications.

f. Care of children at or in day care facilities when the caretaker is employed.

g. Special safety devices needed by handicapped people and not furnished by the employer or another agency.

h. Telephone service required in connection with employment.

i. Unusual expenses required for employment.

(See Determination of Need Chapter for allowance for expenses to obtain employment.)

.234 Deductions of expenses of employment for children not attending school and not setting aside an amount for further education or preparation for future employment under a plan agreed upon with the county welfare department are limited. For children 16 or 17 years of age, the deductions are limited to the extent that net income to the family is not less than $4.00 per month. For children 18 through 20 years of age, the deductions are limited to the extent that

net income to the family is not less than $5.00 per month.

.235 When earnings are from self-employment or operation of a business, the expenses in Items .232 and .233 are deducted with all other normal items of expense incidental to receipt of the income. However, principal payments are not allowed except for tools and equipment essential to the employment.

.236 When an entire item of need in the itemized Cost Schedule is met in kind as a result of service performed, the monetary value of the item as shown in the Cost Schedule is income to the family. The expenses in Items .232 and .233 are deducted with all other normal items of expense incurred in securing the income to determine the net income.

.237 Exempt family earned income (as provided in Section 44-111.23) is to be deducted after all deductions for expenses of employment from income are made.

.24 *Other Deductions from Net Income*

In addition to the deductions described above, deductions for other expenses of persons with income from any source, shall be made as follows:

.241 *Court Ordered Support Payment by Natural Parent*

Deduction for support of a child or spouse not in the home, paid on court order, shall be made not to exceed three months if the parent requests review of the order. If, upon review, the court orders continued support payments, the amount of the court order shall be deducted until the order is changed.

.242 *Stepfather*

Deduction is made from income for:

a. The support payments actually made to or for his dependents living elsewhere.

b. Alimony payments to his ex-wife in the amount of the court order.

c. The cost of medical care of the stepfather and other persons in the Family Budget Unit for whom there is no federal eligibility as child or caretaker.

.243 *Child's Income*

An amount for the child's future and/or current expenditures related to the maximum development of his capabilities shall be deducted whenever income is received by or on behalf of a child. The purpose of the deduction is to provide an incentive to equip him better to participate in constructive activities in which he otherwise may be restricted. The amount for future and/or current needs must be geared to the child's age, his problems, his capacities, and the plan developed by the county welfare department with the child and family to allow him freedom to use or save income for purposes that promote self-reliance and self-improvement. The amount must be reasonable in relation to the purpose for which it is being set aside.

When the amount deducted, or a portion of it, is to be accumulated and used for *future* needs of the child related to educational, vocational, or employment plans, the funds are to be deposited in a separate account in a legal savings institution in the name of the parent or guardian and the child. Withdrawals

may be made from the account for expenses for carrying out these plans as they arise when current income does not meet them. The county welfare department shall inspect the passbook every three months to insure that deposits and withdrawals are consistent with the plan.

.5 *Income of Unmarried Father and a Man Assuming the Role of Spouse*

.51 The amount the unmarried father or man assuming the role of spouse is able to contribute to the *AFDC* family is net income to the FBU.

.52 In situations in which the children of the unmarried father and mother are eligible for *AFDC* on the basis of unemployment or incapacity of the unmarried father, all the children of either parent in the home may be eligible for *AFDC*. In such cases the unmarried father and the mother and all children are included in the FBU and all income of these persons is income to the FBU.

.53 In all other situations, the ability of either the unmarried father or the man assuming the role of spouse to contribute to the FBU is determined as follows:

Step 1. Determine total need in accordance with the *AFDC* assistance standard for the family consisting of the members of the FBU, the unmarried father or man assuming the role of spouse, and his children living in the home.

Step 2. Determine total need of the FBU.

Step 3. Compute the difference between the two budgets to determine the amount that represents

the need of the unmarried father or man assuming the role of spouse for purposes of establishing his responsibility to meet his own needs and the extent of his responsibility to contribute to the FBU.

Step 4. From the needs determined in *Step 3*, deduct his net income computed in accordance with Section 44-113 to establish his ability to contribute to the FBU.

a. If his income exceeds the need, the excess is income to the FBU.

b. If his income does not exceed the need, there is no income to the FBU. His children are needy and may qualify for *AFDC* as a separate case if his income is less than the need.

Appendix D

Section 402(a) (7) of Social Security Act [42 U.S.C. § 602(a) (7)]

After 1967 Amendment

A State plan for aid and services to needy families with children must . . .(7) except as may be otherwise provided in clause (8), provide that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, or of any other individual (living in the same home as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid, as well as any expenses reasonable attributable to the earning of any such income.

Before 1967 Amendment

A State plan for aid and services to needy families with children must . . .(7) provide that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, as well as any expenses reasonably attributable to the earning of any such income; except that, in making such determination, the State agency may, subject to limitations prescribed by the Secretary, permit all or any portion of the earned or other income to be set aside for future identifiable needs of a dependent child.

Appendix E

Regulations of Department of Health, Education of Welfare

Current (45 C.F.R. § 203.1)

(a) A State plan for aid and services to needy families with children under part A of title IV of the Social Security Act, to be approved under section 402 of such Act (42 U.S.C. 602), must provide that the determination whether a child has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, or (if the State plan includes such cases) the unemployment of his father, will be made only in relation to the child's natural or adoptive parent, or in relation to a child's stepparent who is ceremonially married to the child's natural or adoptive parent and is legally obligated to support the child under State law of general applicability which requires stepparents to support stepchildren to the same extent that natural or adoptive parents are required to support their children.

(b) The inclusion in the family, or the presence in the home, of a "substitute parent" or "man-in-the-house" or any individual other than one described in paragraph (a) of this section is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the State. As provided in Interim Policy Statement No. 4 (33 F.R. 10230, July 17, 1968), items 3.C.2(i) and (iii), and 6(ii), in the consideration of all income and resources in establishing financial eligibility and the amount of the assistance payment, only such net income as is actually available for current use on a regular basis will be con-

sidered, and the income only of the parent described in paragraph (a) of this section will be considered available for children in the household in absence of proof of actual contributions.

Obsolete (HEW, Handbook of Public Assistance, Part IV)

3131. *Requirements for State Plans*

7. Effective July 1, 1967, for all new cases, and for all other cases as they come up for redetermination of eligibility thereafter, the State plan must provide that only income and resources that are, in fact, available to an applicant or recipient for current use on a regular basis will be taken into consideration in determining need and the amount of payment.

3120. *Interpretation*

Availability of Income and Resources

In some States, policy has been in effect whereby income and resources, not actually available, have been assumed to be available to applicants and recipients, and have been considered so as to reduce the amount of assistance and thus the total amount actually available for meeting the essentials of living. To meet this inequity, a requirement is being added, to become effective July 1, 1967, for all new cases, and for all other cases as they come up for redetermination of eligibility thereafter.

Under this requirement, a State must differentiate between resources that can be counted on because they are available for current use on a regular basis and those found not to be available for the individual's use in meeting subsistence needs as defined in the State's standard. This means taking into consideration, in

determining need and amount of payment, all current income from all sources, such as earnings, OASDI monthly benefits, contributions, etc., actually available to meet the individual's needs on a regular basis (except as required or permitted to be disregarded or set aside under the various titles of the Social Security Act or other Federal law) and in contrast, omitting from consideration in determining need and amount of payment any income or resources merely assumed to be possessed by the individual.

Thus, income must not be considered where it is not, in fact, *currently* available to the needy individual; e.g., support payments ordered by the court but which are not, in fact, made; contributions which relatives have been determined able to make but which are not, in fact, made; and income from employment assumed to be available in the community when, in fact, the individual is not working.

For cases in which income or resources are initially available, but are then discontinued, e.g., cases in which a payment under a court order, or contributions, continue for several months and then cease, assistance payments will need to be adjusted promptly to reflect this change in circumstances.

Assistance payments must be based on need in the light of currently available income and resources. Current payments cannot be reduced because of prior overpayments, if the recipient no longer has the income available, which occasioned the overpayment. Examples: Unreported income several months ago which is no longer available as well as agency overpayments.

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